Supreme Court, U.S.
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No. 96-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JON PAUL DENMAN
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, 18 U.S.C. §§ 2510 (1994), *et seq.*, prescribes when law enforcement officers may intercept private communications to collect evidence for a criminal investigation. Congress has determined that, upon the submission of a proper application by law enforcement officers, a federal district judge may issue an order allowing the interception of "wire, oral, or electronic communications *within the territorial jurisdiction of the court in which the judge is sitting*." 18 U.S.C. § 2518(3) (1994) (emphasis added).

Does 18 U.S.C. § 2518(3) always give a federal district judge subject matter jurisdiction to order the interception of telephone lines located *outside* the district where the judge sits?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 6

I. CONFLICTING DECISIONS AMONG VARIOUS STATE AND FEDERAL COURTS WARRANT THIS COURT'S REVIEW OF THE ISSUE PRESENTED 6

A. Conflict Between the Fifth Circuit and the Texas Court of Criminal Appeals 6

B. Conflicts Among Federal Circuit Courts 10

C. *Conflicts Among Federal District Courts* 11

II. THE FIFTH CIRCUIT'S DECISION IS ERRONEOUS 12

CONCLUSION 17

TABLE OF AUTHORITIES

CASES: Page

Amati v. City of Woodstock, 829 F. Supp. 998 (N.D. Ill. 1993) 11
Baldwin v. Alabama, 472 U.S. 372 (1985) 6
Berger v. New York, 388 U.S. 41 (1967) 16
Castillo v. State, 810 S.W.2d 180 (Tex. Crim. App. 1991) ..... *passim*
Denman v. United States, 100 F.3d 399 (5th Cir. 1996) ..... *passim*
Evans v. State, 314 S.E.2d 421 (Ga. 1984) 11
Insurance Corp. v. Companie des Bauxites, 456 U.S. 694 (1982) 11
Katz v. United States, 389 U.S. 347 (1967) 16
Kokkonen v. Guardian Life Ins. Co., 114 S.Ct. 1673 (1994) 15
Michigan v. Long, 463 U.S. 1032 (1983) 8
United States v. Burford, 755 F. Supp. 607 (S.D.N.Y. 1991) 11
United States v. Giampa, 904 F. Supp. 235 (D.N.J. 1995) 11
United States v. Moore, 95 U.S. 760 (1877) 13,15
United States v. Nelson, 837 F.2d 1519 (11th Cir.), cert. denied, 488 U.S. 829 (1988) 8,10
United States v. Nordic Village, Inc., 503 U.S. 30 (1992) 13,14
United States v. Rodriguez, 968 F.2d 130 (2d Cir.), cert. denied, 506 U.S. 847 (1992) 5,6,10

STATUTES *and* CONSTITUTIONS:

Omnibus Crime Control and Safe Streets Act of 1968, Tit. III, 82 Stat. 211-225 2
18 U.S.C. § 2510 *et seq.* 2
18 U.S.C. § 2510(4) . . . . . *passim*
18 U.S.C. § 2518(3) . . . . . *passim*
21 U.S.C. § 846 (1994) 4
TEX. CONST. art 5, § 5 7
TEX. CRIM. P. CODE ANN. art. 18.20, § 3 7,8,9

OTHER AUTHORITIES:

CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING § 2:4 (2d ed. 1995) 10
PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 110-25 (1995) 16
Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1434-35 (1987) 12

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PETITION FOR WRIT OF CERTIORARI

Jon Paul Denman petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 100 F.3d 399 (5th Cir. 1996). App. 1a. The judgment of the United States District Court for the Eastern District of Texas is reprinted at App. 14a. The order of the district court denying Denman's motion to suppress is reprinted at App. 16a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 14, 1996. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1994).

STATUTORY PROVISIONS

Relevant portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, 18 U.S.C. §§ 2510 (1994), *et seq.* are reprinted in the Appendix at 17a.

STATEMENT

1. This case turns on the proper interpretation of two federal statutes governing the procedures for implementing wiretaps — 18 U.S.C. § 2518(3) and 2510(4) (1994). Section 2518(3) grants federal district judges subject matter jurisdiction to enter wiretap orders in circumstances prescribed by Congress. After defining what an application for a wiretap order must contain, Section 2518 gives district court judges the following authority:

> (3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications *within the territorial jurisdiction of the court in which the judge is sitting* (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that

> [the applicant has met the statutory requirements for obtaining a judicial order](emphasis added).

To learn how Congress defined the key term "interception" one must turn to Section 2510(4):

> (4) "Intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

The question presented by this case is whether 18 U.S.C. §2518(3) (1994), always gives a district court judge subject matter jurisdiction to order the interception of telephone lines located *outside* the district where he sits.

2. This question arises from facts that are undisputed.[1] During an investigation of suspected cocaine trafficking, the FBI obtained an order from the United States District Court for the *Eastern District* of Texas (District Court) authorizing a wiretap of two telephone lines at the Houston home of Kendall Johnson, located in the *Southern District* of Texas. For 20 days in June 1994 the FBI intercepted, monitored, and recorded the calls at an FBI listening post in Nacogdoches, Texas, located in the Eastern District of Texas. Evidence collected from these wiretaps was used to charge Jon Paul Denman with conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846 (1994). The District Court exercised jurisdiction under 18 U.S.C. § 3231 (1994).

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[1] We recount the facts substantially as outlined in the Fifth Circuit's opinion. App. at 1a-3a.

To the charge of conspiracy Denman entered a plea of not guilty. The magistrate judge set October 11, 1994 as the deadline for filing pretrial motions. On December 13, 1994 Denman's court-appointed attorney was replaced by retained counsel.

On January 3, 1995, less than three weeks after being enrolled in the case, Denman's newly retained counsel filed a motion to suppress the wiretap evidence. Counsel argued that "the court in the Eastern District of Texas had no jurisdiction to order a wiretap on phone lines in the Southern District of Texas." App. 2a. Despite the brief time counsel had been enrolled as Denman's representative, the court denied the motion to suppress as untimely without considering the merits, on the ground that it had been filed after the pretrial motions deadline set by the scheduling order. The wiretap evidence was introduced at trial, and Denman was convicted. He timely appealed to the United States Court of Appeals for the Fifth Circuit.

When it addressed the District Court's denial of Denman's motion to suppress, the Fifth Circuit assumed without deciding that "the district court abused its discretion," App. 4a, by denying Denman's motion to suppress as untimely. The Fifth Circuit nonetheless affirmed the District Court because it concluded that the District Court's error did not prejudice Denman.

3. The Fifth Circuit began its analysis by reading 18 U.S.C. § 2518(3) (1994) together with 18 U.S.C. § 2510(4) (1994). It acknowledged that Section 2518(3) authorizes a judge to issue an order "authorizing or approving interception of wire, oral, or electronic communications within the territorial

jurisdiction of the court in which the judge is sitting . . . ." To define "interception" in Section 2518(3) the court relied on Section 2510(4), which defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication . . . ." The court then acknowledged that it was confronting a novel issue in the Fifth Circuit: "whether, for Title III jurisdictional purposes, an interception takes place *only* where the communication is initially seized by law enforcement." App. 5a (emphasis added).

The Fifth Circuit closely followed the Second Circuit's reasoning in *United States v. Rodriguez*, 968 F.2d 130 (2d Cir.), *cert. denied*, 506 U.S. 847 (1992). In that case the Second Circuit rejected the argument that a wiretap order signed by a judge in New York is "jurisdictionally defective," 968 F.2d at 135, if used as authority to intercept calls placed from telephones in New Jersey. The court began its analysis by acknowledging that the term "interception" in 18 U.S.C. § 2518(3) refers to "where the tapped telephone is located." *Id.* at 136. It further reasoned that 18 U.S.C. § 2510's definition of "intercept" as "aural . . . acquisition" meant that the term "interception" in Section 2518(3) also refers to "where the contents of the redirected communication are first to be heard." *Id.* In addition, the court asserted "sound policy reasons," *id.*, for concluding that both the judge in the judicial district where the telephone lines are located and the district where the intercepted communications are first heard have jurisdiction to issue a wiretap order. "If all of the authorizations are sought from the same court, there is a better chance that unnecessary or unnecessarily long interceptions will be avoided." *Id.* Based on this reading of the statute and its discernment of supporting public policy, the Second Circuit held that the wiretap order was not defective

and affirmed the district court's denial of the defendant's motion to suppress. *See id.*

In reliance on the *Rodriguez* opinion the Fifth Circuit arrived at the following holding:

> [I]nterception includes both the location of a tapped telephone and the original listening post, and . . . judges in either jurisdiction have authority under Title III to issue wiretap orders.

App. 8a. Given this understanding of Title III — the court decided that judges in the Eastern *and* Southern Districts of Texas have jurisdiction to issue wiretap orders on the facts of this case — the Fifth Circuit affirmed the District Court's denial of Denman's motion to suppress because "there was no resultant prejudice and the error was therefore harmless." *Id.*

REASONS FOR GRANTING THE PETITION

I. CONFLICTING DECISIONS AMONG VARIOUS STATE AND FEDERAL COURTS WARRANT THIS COURT'S REVIEW OF THE ISSUE PRESENTED.

A. Conflict Between the Fifth Circuit and the Texas Court of Criminal Appeals

1. One basis for this Court's granting *certiorari* exists when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with a decision by a state court of last resort . . . ." SUP. CT. R. 10(a); *see also Baldwin v. Alabama*, 472 U.S. 372, 374 (1985). This case falls in that category. The Fifth Circuit's holding below

directly conflicts with the judgment in *Castillo v. State*, 810 S.W.2d 180 (Tex. Crim. App. 1991) (en banc), decided by the Court of Criminal Appeals of Texas, the "court of last resort," SUP. CT. R. 10(a), for criminal appeals in Texas. *See* TEX. CONST. art 5, § 5.

In *Castillo* the Court of Criminal Appeals addressed "whether the court of appeals correctly interpreted the wiretap authorization provision contained in Article 18.20, § 3 of the Texas Code of Criminal Procedure." 801 S.W.2d at 181. Article 18.20, § 3(b), the most pertinent section of the Texas statute, reads:

> (b) Except as provided by Subsection (c) of this section, only the judge of competent jurisdiction for the administrative judicial district in which the proposed interception will be made may act on application for authorization to intercept wire or oral communications.

Section 1(3) of Article 18.20, which defines "intercept" as "the aural acquisition of the contents of a wire or oral communications through the use of an electronic, mechanical, or other device," "was taken essentially verbatim from 18 U.S.C. § 2510(4)."[2] *Castillo*, 810 S.W.2d at 182. Thus, the proper interpretation of this state statute turns on the interpretation of federal law. Moreover, "because § 1(3) [the

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[2] In 1986 Congress amended 18 U.S.C. § 2510(4) to add the language in italics: "'Intercept' means the aural *or other* acquisition of the contents of any wire, *electronic*, or oral communication . . . ." Pub. L. 99-508, § 101(a)(3) (1986) (emphasis added). These changes do not dilute the relevance of *Castillo* for the case at bar because this case involves the wiretapping of telephone lines, a form of interception untouched by the 1986 amendments.

Texas state code definition of "interception"] was borrowed from the federal wiretap statute," *id.* at 183, the Court of Criminal Appeals deemed it "appropriate . . . to consider the construction placed upon the federal statute by other courts." *Id.* Absent an adequate and independent ground of decision under state law, this Court has said that it "will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). The *Castillo* court confronted the same definitional issue in this case — how to construe "intercept" — yet the Texas court's interpretation is flatly at odds with the Fifth Circuit's holding.

The Court of Criminal Appeals considered cases from two other courts — one state and one federal — that it viewed as opposing interpretations of the term "intercept" or its counterpart, "aurally acquired." In the first case, *Evans v. State*, 314 S.E.2d 421 (Ga. 1984), the Georgia Supreme Court held that "intercept" refers to where the listening post is located. *See id.* at 426. The Texas court also considered the Eleventh Circuit case of *United States v. Nelson*, 837 F.2d 1519 (11th Cir.), *cert. denied*, 488 U.S. 829 (1988). In *Nelson* the court held that "intercept" "refers to the place where a communication is initially obtained regardless of where the communication is ultimately heard." 837 F.2d at 1527.

The Court of Criminal Appeals followed *Nelson*, holding that the term "intercept" in Article 18.20, § 1(3) refers only to where the wiretap is placed. *See* 810 S.W.2d at 184. Two reasons influenced its decision to adopt this interpretation.

First, interpreting "intercept" to mean the location of a listening post would promote forum shopping.

> [A] wiretap at *any* location in Texas could be authorized by *any* [authorizing judge] . . . because, with modern communications technology, a listening post can be established hundreds of miles away from the place under surveillance. . . . [L]aw enforcement officials would be free to 'shop' for a sympathetic judge from which to obtain an intercept order.

Castillo, 810 S.W.2d at 184. Second, forum shopping would "effectively destroy," *id.*, the "territorial restriction," *id.*, expressed in the words, "judge . . . *for the administrative judicial district in which the proposed interception will be made*." TEX. CRIM. P. COLE ANN. art. 18.20, § 3(a) (emphasis added).

The decision in *Castillo* squarely conflicts with the Fifth Circuit's judgment below. In *Castillo* the highest court of criminal appeals in Texas held that the definition of "intercept," which Texas law borrowed verbatim from federal law, refers to where a wiretap is placed but not where the communications captured by a wiretap are heard. *See* 810 S.W.2d at 184. In the case at bar the Fifth Circuit reached the opposite conclusion: that the concept of "intercept" under federal law refers to both places. *See* App. 8a. This conflict over the proper interpretation of "intercept" is irreconcilable. It is especially acute because it occurs between a federal circuit court and a state court located within the same circuit.

B. Conflicts among Federal Circuit Courts

Far from being limited to the State of Texas, the conflict presented by this case has entangled other federal circuits as well. The Second Circuit, whose opinion in *United States v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992) provided the basis for the Fifth Circuit's holding below, has held that interception refers both to "where the tapped telephone is located [and] where the contents of the redirected communications are first to be heard." The Eleventh Circuit has held, on the contrary, that interception "refers to the place where a communication is initially obtained regardless of where the communication is ultimately heard." *United States v. Nelson*, 837 F.2d 1519, 1526 (11th Cir. 1988). *See Castillo v. State*, 810 S.W.2d 180, 183-84 (Tex. Crim. App. 1990) (discussing the holding in *Nelson* as the chief alternative to interpreting the term "intercept" as the place where wiretap evidence is heard); CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING § 2:4, at 2-8 (2d ed. 1995) (suggesting that *Nelson* represents an approach to interpreting the statutory meaning of "intercept" which conflicts with the line of cases that includes *United States v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992)). In *Nelson* the court addressed the validity of a wiretap order issued by a judge for telephone lines located in the same judicial district where the judge sat. *See* 837 F.2d at 1526. This difference from the facts in the case at bar, while minor, was considered sufficient by the Fifth Circuit to view *Nelson* as distinguishable from this case. App. 7a.

C. Conflicts among Federal District Courts

The conflict presented by this case has not only touched federal circuit courts, *compare* App. 1a *and Rodriguez*, 968

F.2d at 136, *with Nelson*, 837 F.2d at 1527, and state courts, *compare Evans v. State*, 314 S.E.2d 421, 426 (Ga. 1984) *with Castillo*, 810 S.W.2d at 183-84, but federal district courts as well. In *United States v. Burford*, 755 F.Supp. 607 (S.D.N.Y. 1991), the court held that since "interception" refers both to where the wiretap is placed and where the communications are heard, no jurisdictional defect barred a federal judge in New York from issuing an order to wiretap a telephone line in Maryland. *See id.* at 610. Another district court has interpreted the term "interception" similarly. *United States v. Giampa*, 904 F.Supp. 235, 278 (D.N.J. 1995). By contrast, in *Amati v. City of Woodstock*, 829 F.Supp. 998 (N.D. Ill. 1993), the court followed the Eleventh Circuit's lead in *United States v. Nelson*, 837 F.2d 1519 (11th Cir. 1988), holding that "the term 'intercept' . . . refers to the place where a communication is initially obtained. Whether the communication is heard by the human ear is irrelevant." 829 F.Supp. at 1008.

This pattern of conflicts, which exists at multiple levels and in courts across the Nation, has left the scope of a federal district court's subject matter jurisdiction to issue a wiretap order in profound uncertainty.

Moreover, this conflict raises "an important federal question." SUP. CT. R. 10(a). The judicial interpretation of "intercept," whether construed narrowly as in *Castillo* and other cases, or broadly as in the Fifth Circuit decision below, controls whether a particular judge has *subject matter jurisdiction* to issue a wiretap order — a constitutional as well as a statutory requirement, and one which "functions as a restriction on federal power . . . ." *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982). Because

the proper limits of a federal court's subject matter jurisdiction are in play, the importance of the issue presented is readily apparent.

II. THE FIFTH CIRCUIT'S DECISION IS ERRONEOUS.

Of course, this Court need not resolve every conflict between a federal court of appeals and the highest court of a state, even in a case that raises an important question of federal law. *Cf.* Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1434-35 (1987). This case, however, merits review not only because it presents such a conflict, but because it raises an important question of federal law that the Fifth Circuit decided erroneously.

The two statutory provisions at issue in this case are 18 U.S.C. §§ 2518(3) and 2510(4). Section 2518(3) provides:

> (3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that [the applicant has met the statutory requirements for obtaining a judicial order].

Section 2510(4) defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral

communication through the use of any electronic, mechanical, or other device."

The axioms of statutory construction include "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992). In addition, when faced with an apparent conflict between two provisions of a federal statute this Court has long followed the rule that it will construe the statute in a manner that allows both provisions to stand. *See, e.g., United States v. Moore*, 95 U.S. 760, 763 (1877). The straightforward application of these canons in the instant case illustrates the error of the Fifth Circuit's holding.

Under Section 2518(3), the district court judge's authority to enter a wiretap order is qualified in the following terms:

> [T]he judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications *within the territorial jurisdiction of the court in which the judge is sitting* . . . .

18 U.S.C. 2518(3) (1994) (emphasis added). The italicized words plainly qualify the scope of the judge's subject matter jurisdiction to enter a wiretap order by imposing an explicit geographic parameter: "the judge may [order a wiretap] *within the territorial jurisdiction* of the court in which the judge is sitting." *Id.* (emphasis added).

Significantly, Section 2518(3) contains only one exception to this limitation:

> (3) Upon such application the judge may enter an ex parte order . . . authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States *in the case of a mobile interception device* authorized by a Federal court within such jurisdiction) . . . .

The language within the parentheses is the sole exception to the territorial restriction laid down by Congress in Section 2518(3). Thus, a judge has authority to order a wiretap on telephone lines located *outside* "the territorial jurisdiction of the court in which the judge sits" if and only if the case involves "a mobile interception device authorized by a Federal court within such jurisdiction." *Id.*

The Fifth Circuit, however, did not approach the statute in this way. Instead, it read the statutory definition of "intercept" in Section 2510(4) together with Section 2518(3), and held that "interception includes both the location of a tapped telephone and the original listening post." App. 8a. Based on this assessment the court concluded that "judges in either jurisdiction have authority under Title III to issue wiretap orders." *Id.* In other words, the Fifth Circuit construed Section 2510(4) in a manner that eliminated the geographic restriction on the judge's subject matter jurisdiction contained in Section 2518(3).

The Fifth Circuit's construction of the term "interception" is objectionable on three grounds. First, it defeats the evident intent of Congress by failing to give "every word . . . some operative effect." *United States v. Nordic Village, Inc.*, 503

U.S. 30, 36 (1992). Instead of adopting an interpretation of Sections 2510(4) and 2518(3) that allow both to stand, *see United States v. Moore*, 95 U.S. 760, 763 (1877), the Fifth Circuit read 13 words from the latter — "within the territorial jurisdiction of the court in which the judge is sitting" — as if they had no efficacy at all.

Second, the Fifth Circuit's interpretation effectively substitutes its judgment for the policy of Congress. Congress demonstrated its legislative intent to create an express exception to the condition of territoriality, which generally limits the exercise of subject matter jurisdiction under Section 2518(3), when it carved out such an exception for cases involving "a mobile interception device." Neither Section 2518(3) nor Section 2510(4) evinces further congressionally-crafted exceptions to this geographic restriction. Whether the subject matter jurisdiction exercised by a judge reviewing an application for a wiretap order should be limited by geography is a matter for Congress, not the courts, to decide.

Third, aside from the obvious problems raised when a court adopts a statutory interpretation that supplants clearly discernible congressional intent, judicial action of this sort is troubling because lower federal courts are particularly obligated to abide by the limits of their subject matter jurisdiction *as set by Congress*. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co.*, 114 S.Ct. 1673, 1675 (1994).

The importance of these objections to the Fifth Circuit's holding is magnified when one considers the history behind the

statute. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, 18 U.S.C. §§ 2510 (1994), *et seq.*, was drafted in conscientious response to this Court's lessons on the permissible scope of electronic surveillance under the Fourth Amendment, as contained in *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). *See* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153. Moreover, Congress enacted Title III only after many years of political and constitutional development, which ultimately allowed it to craft a compromise that authorized government to use the tools of electronic surveillance, subject to strict legal controls. *See generally* PRISCILLA M. REGAN, LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY 110-25 (1995) (summarizing the political and legal developments in this area from the nineteenth century to the enactment of Title III). Given the constitutional concerns with personal privacy which were the philosophical underpinnings of the statute's strict safeguards, *see* App. 19a-22a, the Fifth Circuit's errant construction of the subject matter jurisdiction prescribed under Sections 2518(3) and 2510(4) presents an issue of indisputable significance.

* * *

In sum, this case merits review for two reasons. The Fifth Circuit's ruling conflicts with the decision of the Court of Criminal Appeals of Texas in *Castillo v. State*, 810 S.W.2d 180 (Tex. Crim. App. 1991) (en banc) and conflicts at multiple levels with other state and federal courts. In addition, the case merits review because the Fifth Circuit's opinion is erroneous. That judgment turns on a misconstruction of the conditions under which Congress has granted subject matter jurisdiction for federal district courts to order the wiretapping of private

telephone lines. Review by this Court will bring needed clarity and consistency to this increasingly muddled area of federal law.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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February 12, 1997

UNITED STATES of America, Plaintiff-Appellee,
v.
Jon Paul DENMAN and Melvis T. Denman, Defendants-Appellants.

No. 95-40435.
United States Court of Appeals,
Fifth Circuit
Nov. 14, 1996.

Appeal from the United States District Court for the Eastern District of Texas

Before POLITZ, Chief Judge, and JOLLY and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:

Jon Paul Denman and Melvis Tyrone Denman appeal their convictions for conspiracy to distribute cocaine base. For the reasons assigned, we affirm.

BACKGROUND

During an investigation of suspected cocaine trafficking, the Federal Bureau of Investigation obtained an order from the United States District Court for the Eastern District of Texas authorizing a wiretap of two telephone lines at the Houston home of Kendall Johnson. For 20 days in June 1994 the FBI intercepted, monitored, and recorded the calls at an FBI listening post in Nacogdoches, Texas. The wiretap evidence was filed during the trial of Jon Paul Denman and his cousin, Melvis Tyrone Denman, and both were

convicted of conspiracy to distribute cocaine base in violation of 21 U.S.C. § 846.

Sixteen persons were charged in the conspiracy; all pled guilty except the Denmans. The magistrate judge set an October 11, 1994 deadline for filing pretrial motions for Jon Denman and a November 14, 1994 deadline for Melvis Denman. A superseding indictment was filed on October 6. On the same day that pretrial motions were due, Melvis Denman's court-appointed lawyer filed a motion to withdraw. He had filed no pretrial motions. On November 23 retained counsel sought to enroll for Melvis Denman and filed a motion seeking a continuance and revised scheduling order. The court granted the appointed lawyer's motion to withdraw, enrolled new counsel, granted Melvis Denman's motion for a continuance on the grounds that his new attorney needed time to prepare a complex case, and consolidated the two cases and set them for trial on January 4, 1995. The court denied the request for a new scheduling order and declined to allow the filing of any new pretrial motions, while allowing the withdrawal of appointed counsel, enrollment of new counsel, and the continuance of trial of the now consolidated cases. On December 13, 1994 Jon Denman's court-appointed attorney was replaced by retained counsel.

On January 3, 1995 the Denmans filed motions to suppress the wiretap evidence, contending that the court in the Eastern District of Texas had no jurisdiction to order a wiretap on phone lines located in the Southern District of Texas. The district court denied the motions as untimely because they were filed beyond the date set by the court's previous order and on the eve of trial.

During voir dire the Denmans objected to the prosecution's peremptory challenge of a black woman. Determining that the prosecution had a nonracial reason for the exclusion, the court overruled the objection. After a defense complaint about a conversation which took place between Mike Kelly, an agent who had worked on the government's case, and two jurors, the judge conducted a hearing at which the jurors testified that the three had not discussed anything concerning the case. The court denied motions for a mistrial. The jury returned guilty verdicts. The Denmans timely appealed.

ANALYSIS

Admissibility of Wiretap Evidence.

After refusing to extend the deadline for filing pretrial motions, the district court denied defendants' motions to suppress the wiretap evidence as untimely, without consideration of the merits. Fed.R.Crim.P. 12(c) provides that the court may set a time for the making of pretrial motions or requests. Rule 12(f) provides that the failure of a party to make pretrial motions by the time set pursuant to Rule 12(c) constitutes waiver, but the court "for cause shown may grant relief from the waiver." Under the Omnibus Crime Control and Safe Streets Act ("Title III"), "[a]ny aggrieved person in any trial, hearing, or proceeding in or before any court ... may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that ... the order of authorization or approval under which it was intercepted is insufficient on its face." Such motion "shall be made before the trial, hearing, or proceeding unless there was no

opportunity to make such motion or the person was not aware of the grounds of the motion."[1]

A decision to deny a suppression motion as untimely under Rule 12(f) is reviewed for abuse of discretion,[2] giving due consideration to the movant's reason for missing the relevant deadline and any prejudice the refusal might occasion.[3]

The Denmans contend that because the court-appointed attorneys filed no pretrial motions and the trial court considered Melvis Denman's retention of a new attorney sufficient grounds for continuing the trial, it was unreasonable not to allow the new attorneys time to file motions. The government contends that the filing of the suppression motions the day before trial was untimely and was an attempt to abuse the rules. We will assume without deciding that the district court abused its discretion when it allowed counsel to enroll and continued the trial, but refused to extend the scheduling order, even briefly, to allow the newly-enrolled counsel to file pretrial motions. We therefore turn to consider whether the district court's error was prejudicial. The only prejudice advanced by the defendants is that the evidence of the wiretaps should have been suppressed.

The Denmans contend that the wiretap jurisdictionally

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[1] 18 U.S.C. § 2518(10)(a).

[2] *United States v. Knezek*, 964 F.2d 394 (5th Cir.1992).

[3] *See Wainwright v. Sykes*, 97 S.Ct. 2497 (1977); *United States v. Elam*, 678 F.2d 1234 (5th Cir.1982); 1 C. Wright, *Federal Practice and Procedure* § 193.

was defective because it was authorized by a judge outside the judicial district in which the subject telephones were located. The wiretap order was issued by a judge in the Eastern District of Texas where the calls were monitored and recorded; the tapped telephones were located in Houston within the Southern District of Texas.

Title III provides that a judge may enter an order "authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting."[4] Intercept is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."[5]

The issue whether, for Title III jurisdictional purposes, an interception takes place *only* where the communication is initially seized by law enforcement, is *res nova* for our Circuit. Our colleagues in the Second Circuit, in *United States v. Rodriguez*,[6] interpreted interception as used in Title III to include *both* the place where the lines are tapped *and* the place where the communications are heard by law enforcement. They held that a wiretap order may be issued by a court in either jurisdiction. Confronting a fact situation very similar to that in the instant case, *Rodriguez* rejected an argument that orders to wiretap New Jersey telephones were defective because they were issued by a district judge in New York. The

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[4] 18 U.S.C. § 2518(3).

[5] 18 U.S.C. § 2510(4).

[6] 968 F.2d 130 (2d Cir.), *cert. denied*, 113 S.Ct. 139, 140 & 663 (1992).

court found that the location of an interception *includes,* but is not limited to, the situs of the telephone itself. Because the definition of interception encompasses the aural acquisition of the contents of the communication, "the interception must also be considered to occur at the place where the redirected contents are first heard."[7] The court reasoned that because aural is defined as "pertaining to the ear or the sense of hearing," it follows that "the place where the contents of a wire communication are first to be heard and understood by human ears, other than those of the parties to the conversation, is the situs of an interception within the meaning of s 2510(4)."[8] In a decision interpreting a similarly worded Oklahoma wiretap law, our colleagues in the Tenth Circuit adopted the *Rodriguez* holding that the location of an interception includes the place where law enforcement officers listened to the communication which they intercepted.[9]

The Denmans contend that the contents of phone communications are acquired for Tide III purposes only at the time the lines are tapped. They contend that *United States v.*

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[7] *Id.* at 136.

[8] *Id*(quoting *Webster's New Internat'l Dictionary* at 182 (2d ed.1957). The phrase "or other" was inserted after aural in section 2510(4) in 1986 to ensure privacy protection for new forms of communication such as electronic pagers, electronic mail, and computer-to-computer communications, thus expanding the previous definition that had only applied where the contents of a communication could be overheard and understood by the human ear. *Rodriguez* at 136 (quoting 1986 U.S.Code Cong. & Admin. News 3556).

[9] *United States v. Tavarez,* 40 F.3d 1136 (10th Cir.1994).

Turk[10] and *United States v. Nelson*[11] support the proposition that interception occurs only where the communication initially was obtained. In *Turk* we rejected an argument that the police officers' listening to an audiotape which had been made by an arrestee was an illegal interception under Title III. We held that an interception "requires, at the least, involvement in the initial use of the device contemporaneous with the communication to transmit or preserve the communication."[12] *Turk* acknowledged, however, without deciding, that "aural acquisition" might encompass two activities: the initial acquisition by a device and the hearing of the communication by the person responsible for the recording. *Turk* does not limit the definition of interception to the initial acquisition by a device.

In *Nelson* the Eleventh Circuit held that interception as used in Title III "refers to the place where a communication is initially obtained regardless of where the communication is ultimately heard."[13] *Nelson,* however, involved facts which are the mirror opposite of those in the case at bar: the wiretapped telephones were located in the authorizing judge's jurisdiction but the signals were transmitted to a law enforcement listening post outside the judicial circuit. Thus, while the holding of *Nelson* is that the initial acquisition is an interception, the court did not rule out the possibility that the initial listening to the recording by the intercepting agent

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[10] 526 F.2d 654 (5th Cir.), *cert. denied,* 429 U.S. 823 (1976).

[11] 837 F.2d 1519 (11th Cir.), *cert. denied,* 109 S.Ct. 82 (1988).

[12] *Turk* at 658 n. 3.

[13] *Nelson* at 1527.

might also be considered part of the interception. In any event, *Nelson* noted that territorial jurisdictional limitations did not implicate Congress's core concerns in passing Title III.[14]

We agree with the reasoning of the Second Circuit and now hold that interception includes both the location of a tapped telephone and the original listening post, and that judges in either jurisdiction have authority under Title III to issue wiretap orders. As the *Rodriguez* court noted, this interpretation aids an important goal of Title III, to protect privacy interests, by enabling one judge to supervise an investigation that spans more than one judicial district. "If all of the authorizations are sought from the same court, there is a better chance that unnecessary or unnecessarily long interceptions will be avoided."[15]

Based on the foregoing, we conclude that even if the district court abused its discretion in refusing to extend the scheduling order to allow the defendants to file pretrial motions, there was no resultant prejudice and the error was therefore harmless.

Batson Challenge.

The Denmans challenge the prosecutor's peremptory excusal of Betty Tanner, an African-American. The prosecution explained its action thusly:

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[14] *Id.*

[15] *Rodriguez* at 136.

A: Your honor, I did not strike Ms. Tanner because she is African-American. I struck her because she is from the town of San Augustine. This spring an article critical of [a] San Augustine investigation was released in the New Yorker magazine. I know from my experience that the fallout from the so-called white tornado investigation that there are hard feelings in San Augustine and she is a relative of the individual [who] was investigated in that case, and in view of the law enforcement in San Augustine County does not have a favorable view of the federal government because of that investigation. I know that of my own personal experience. In addition, Ms. Tanner was single. My own preference is for people who are married and of that type have stability.

Q: I thought I did hear her say something where she was a relation to some of the parties that y'all prosecuted.

A: She was related to Jeffery Tanner who is now deceased who was a party in that case.

Q: What type of party?

A: He was investigated at the time. He was not prosecuted because he was already in the state prison at the time the indictments were returned in June or May of 1989.

The court then stated:

> I find that Mr. Bales has been able to articulate a non-racial reason, specifically the investigation that this court takes judicial notice of that occurred in San Augustine County and it has created hard feelings along with the articles that have been written by the

> citizens of San Augustine condemning law enforcement officers, so I'm going to allow his strike to remain.

An allegation of racial discrimination in the use of peremptory challenges mandates a three-step inquiry: (1) the defendant must establish a *prima facie* case by raising an inference that the prosecution struck potential jurors because of their race; (2) the prosecution must articulate race-neutral and reasonably specific explanations for each challenged strike; and (3) the trial court must determine whether the defendant has proved intentional discrimination.[16]

We review for clear error the trial court's finding whether discrimination in violation of *Batson* occurred, giving great deference to the district court's finding that the prosecutor's explanation was credible.[17]

The Denmans characterize as specious the prosecutor's explanation that Tanner is from a town where the prosecutors conducted a high-profile investigation. They further contend that the fact that the juror was a relative of a target of the investigation is also pretextual because the woman testified that she was "not really close" to him. We entertain no doubt that a prosecutor may use a peremptory challenge to exclude a potential juror with a family relationship to a person targeted by the same prosecutor in a controversial, much-publicized criminal investigation. Indeed a challenge for cause would

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[16] *Purkett v. Elem*, 115 S.Ct. 1769 (1995); *Batson v. Kentucky*, 106 S.Ct. 1712 (1986).

[17] *United States v. Wallace*, 32 F.3d 921 (5th Cir.1994).

not be inappropriate. Because the prosecution need only articulate a non-racial explanation for a peremptory challenge, the trial court's implicit finding that the Denmans failed to prove intentional discrimination is not erroneous.

Communication with Jurors.

Jon Denman appeals the district court's denial of appellants' motion for mistrial based on communications between Mike Kelly, an agent who worked on the government's case, and two jurors. On the third day of trial, Melvis Denman's attorney notified the judge that he had observed during the trial

> on at least three, possibly four occasions where during the breaks or prior to court convening, and if I'm not mistaken, maybe one time after court had let out, that various members of the jury would be standing around in a very informal social manner ... and that Mike Kelly, who is a member of the Deep East Texas Drug Task Force who has been identified and pointed out by the government in this case as an agent who has worked on this case ... engaged in a conversation [with] a woman [who] was on this jury panel.

Upon learning of the matter, the court immediately conducted a hearing outside the presence of the jury. Under cross-examination by defense counsel, Kelly testified that as he was leaving the courthouse during a recess one of the jurors jokingly said to him that it was too early to leave because he did not work "bankers' hours." Kelly testified that they discussed a state trooper whom the juror knew who did work "bankers' hours" giving safety speeches. Kelly testified

that he did not discuss the case with the jurors. Under interrogation by the court the two jurors testified that they did not discuss the case with Kelly, but had talked only about going home that day, about the Department of Public Safety, and about a state trooper one of them knew. The court instructed the jurors not to talk to anyone other than the bailiffs, ordered Kelly to remain outside the courthouse until the trial ended, and denied the motion for a mistrial.

We review for abuse of discretion a trial judge's denial of a motion for mistrial based on allegations of improper extrajudicial conduct by jurors.[18]

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial.... The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant that such contact with the juror was harmless to the defendant.[19]

The trial court is required to conduct a hearing to determine the circumstances of the communication, its impact on the juror, and whether prejudice resulted.[20] We have

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[18] *United States v. Burke*, 496 F.2d 373 (5th Cir.), *cert. denied*, 95 S.Ct. 229 (1974).

[19] *Remmer v. United States*, 74 S.Ct. 450, 451 (1954) (citations omitted).

[20] *Smith v. Phillips*, 102 S.Ct. 940 (1982).

required a two-step inquiry: (1) whether the challenged interchange was about the matter pending before the jury, and (2) whether the defendant was prejudiced by the discussion.[21] In some cases, even when the pending case was not discussed, fraternizing between jurors and third parties may prejudice the defendant and require reversal. An appellate court may order reversal when the trial court conducted an insufficient investigation to determine whether such communications were clearly not prejudicial.[22]

We conclude that the trial court's investigation was sufficient to make a reasonable determination that the communication, while improper, was clearly not prejudicial. The testimony of Kelly and the jurors establishes that the communication was not about the pending matter and that the contact was insignificant enough to eliminate concern that the Denmans might be prejudiced. Under examination by defense counsel, Kelly testified that this was the first time he had spoken with a juror in the case other than to exchange greetings.

By thoroughly investigating the matter, subjecting Kelly to cross-examination by defense counsel, cautioning the jury, and banning Kelly from the courthouse, the trial judge took effective steps to ensure the impartiality of the jury. Under these circumstances, we are not prepared to say that the court's overruling of the Denmans' motion for a mistrial was an abuse of discretion.

The judgments appealed are AFFIRMED.

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[21] *Burke.*

[22] *United States v. Betner,* 489 F.2d 116 (5th Cir.1974).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA

v. Case Number CR 9:94cr12-6

Defendant.
JON PAUL DENMAN

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JON PAUL DENMAN, was represented by Roger Moss.

The defendant was found guilty on count(s) 1 of the Second Superseding Indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count
21 USC 846 21 USC 841(b)(1)(A)	Conspiracy to Possess With Intent To Distribute Cocaine Base	6/20/94	1

As pronounced on 05/18/95, the defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for count(s) 1, which

shall be due immediately.

It is further ordered the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 19th day of May, 1995.

/s/ John Hannah, Jr.
United States District Judge

Defendant's SSN: 627-01-3171
Defendant's Date of Birth: 11/14/71
Defendant's address: Route 3 Box 385, Rusk, TX 75785

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

UNITED STATES OF AMERICA

v.

CRIMINAL ACTION NO.
9:94 CR 12

JON PAUL DENMAN AND
MELVIS TYRONE DENMAN

ORDER

On January 4, 1995, came before the Court the defendants in the above styled cause and the Court heard the respective Motions to Suppress Evidence of Defendants Jon Paul Denman and Melvis Tyrone Denman.

The Court notes that the parties were previously directed by the court order dated September 21, 1994, to file all pretrial motions, including motions to suppress evidence on or before October 11, 1994. Both defendants filed their respective motions on January 3, 1995, which was well beyond the date set by the Court's previous order and also on the very eve of trial. For this reason, the Court finds the motions to be untimely and that they should be DENIED.

IT IS SO ORDERED.

SIGNED this 4th day of January, 1995.

/s/ John Hannah, Jr.
U. S. DISTRICT JUDGE

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 119--WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

s 2510. Definitions

As used in this chapter--

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device;

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire,

oral, or electronic communication other than--

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

* * *

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means--

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

* * *

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include--

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds; electronic, or oral communication through the use of any electronic, mechanical, or other device.

* * *

s 2518. Procedure for interception of wire, oral, or electronic communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is

to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic

communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that--

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify--

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance. Pursuant to section 2522 of this chapter, an order may also be issued to enforce the assistance capability and capacity requirements under the Communications Assistance for Law Enforcement Act.

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception

under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

* * *

(12) An interception of a communication under an order with respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of this section do not apply by reason of subsection (11) shall not begin until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order as provided for in subsection (11)(b) may move the court to modify or quash

the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court, upon notice to the government, shall decide such a motion expeditiously.